Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

R.A. BARTON; J.R. BARTON; J.R. BARTON, JR.; and BLAKE BARTON,
Petitioners,

v.

AMERICAN RED CROSS and EOLINE MCGOWAN, M.D.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the appeals court erred in affirming the district court order (a) holding that expert testimony was required in this case and that the expert offered by the Bartons did not qualify as such, and (b) granting summary judgment in favor of the Defendants as to the Bartons' claim that the blood testing and donor screening procedures in this case violated the applicable standard of care.

2. Whether the appeals court erred in affirming the district court order refusing to provide adequate time in which to locate the donor of the blood in this case and by failing to compel testimony.

3. Whether the appeals court erred in affirming the district court order granting summary judgment in favor of Defendant/Appellee the Red Cross as to the Bartons' claim that the Defendants were negligent and/or wanton is delaying lookback notification for six months in this case.

4. Whether the appeals court erred in affirming the district court order granting summary judgment in favor of the Red Cross as to the Bartons' claim that the Defendants fraudulently suppressed from the Plaintiffs the information that the blood donor in this case was HIV-positive and whether such conduct constituted outrageous conduct.

5. Whether the appeals court erred in affirming the district court order in its decisions to strike the Bartons' claim for punitive damages and demand for jury trial on the basis that the Red Cross was a federal instrumentality entitled to sovereign immunity, and to dismiss all claims but one against Defendant/Appellant Dr. McGowan, on the grounds that she was entitled to federal official immunity.

PARTIES, PARENT COMPANIES AND SUBSIDIARIES

In compliance with Supreme Court Rule 14(b), the Petitioners represent that the parties to this petition are all named in the caption of this case. To the knowledge of the Petitioners, there are no parent companies or non-wholly owned subsidiaries with an interest in the case.

Southeast Alabama Medical Center and Dr. John P. Moore were initially made parties Defendant, but they were dismissed and are no longer parties.

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REFERENCE TO REPORTS OF OPINIONS

The unpublished decision of the United States Court of Appeals for the Eleventh Circuit in two cases was entered on December 16, 1994 (App. 1a), and the order denying rehearing and rehearing en banc was entered on March 23, 1995. (App. 68a). Decisions of the United States District Court for the Middle District of Alabama in the case are reported at 826 F. Supp. 407 (M.D. Ala. 1993), 826 F. Supp. 412 (M.D. Ala. 1993), and 829 F. Supp. 1290 (M.D Ala. 1993.)

CONCISE STATEMENT OF GROUNDS FOR JURISDICTION

The judgment or order of the United States Court of Appeals for the Eleventh Circuit being reviewed is dated December 16, 1994. (App. 1a), and that Court denied rehearing and rehearing en banc on March 23, 1994. (App. 68a).

The statutory provision conferring jurisdiction upon this Court to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. § 1254(1). Supreme Court Rule 10 of the Supreme Court Rules provides for review of a court of appeals decision when the decision has (a) "so far departed from the accepted and usual cause of judicial proceedings, or sanctioned such a departure by a lower court, as to call for this Court's power of supervision," or when the court of appeals (b) "has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflict with applicable decisions of this court".

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, with just compensation.

United States Constitution, Amendment XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

36 U.S.C. § 2:

The name of this corporation shall be "The American National Red Cross", and by that name it shall have perpetual succession, with the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States; to have and to hold such real and personal estate as shall be deemed advisable and to dispose of the same, to accept gifts, devises, and bequests of real and personal estate for the purposes of this corporation hereinafter set forth; to adopt a seal and the same to alter and destroy at pleasure; and to have the right to have and to use, in carrying out its purposes hereinafter designated, as an emblem and badge, a Greek red cross on a white ground, as the same has been described in the treaties of Geneva, August twenty-second, eighteen hundred and sixty-four and July twenty-seventh, nineteen hundred and twenty-nine, and adopted by the several nations acceding thereto; to ordain and establish by-laws and regulations not inconsistent with the laws of the United States of America or any state thereof, and generally to do all such acts and things as may be necessary to carry into effect the provisions of this act and promote the purposes of said organization; and the corporation hereby created is designated as the organization which is authorized to act in matters of relief under said treaties. In accordance with the said treaties, the delivery of the brassard allowed for individuals neutralized in time of war shall be left to military authority.

Ala. Code 1975, § 6-5-542(2):

(2) Standard of Care. The standard of care is that level of such reasonable care, skill, and diligence as other similarly situated health care providers in the same general line of practice, ordinarily have and exercise in like cases. A breach of the standard of care is the failure by a health care provider to comply with the standard of care, which failure proximately causes personal injury or wrongful death. This definition applies to all actions for injuries or damages or wrongful death whether in contract or tort and whether based on intentional or unintentional conduct.

Ala. Code 1975, § 6-5-548:

(a) In any action for injury or damages or wrongful death, whether in contract or in tort, against a health care provider for breach of the standard of care the plaintiff shall have the burden of proving by substantial evidence that the health care provider failed to exercise such reasonable care, skill and diligence as other similarly situated health care providers in the same general line of practice, ordinarily have and exercise in a like case.

(b) If the health care provider whose breach of the standard of care is claimed to have created the cause of action is not certified by an appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself out as a specialist, a "similarly situated health care provider" is one who:

(1) Is licensed by the appropriate regulatory board or agency of this or some other state; and

(2) Is trained and experienced in the same discipline or school of practice; and

(3) Has practiced in the same discipline or school of practice during the year preceding the date that the alleged breach of the standard of care occurred.

(c) If the health care provider whose breach of the standard of care is claimed to have created the cause of action is certified by an appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a "similarly situated health care provider" is one who:

(1) Is licensed by the appropriate regulatory board or agency of this or some other state; and

(2) Is trained and experienced in the same speciality; and

(3) Is certified by an appropriate American board in the same speciality; and

(4) Has practiced in this specialty during the year preceding the date that the alleged breach of the standard of care occurred.

(d) No evidence shall be admitted or received, whether of a substantive nature or for impeachment purposes, concerning the medical liability insurance, or medical insurance carrier, or any interest in an insurer that insures medical or other professional liability, or any witness presenting testimony as a "similarly situated health care provider" under the provisions of this section or of any defendant.

(e) The purpose of this section is to establish a relative standard of care for health care providers. A health care provider may testify as an expert witness in any action for injury or damages against another health care provider based on a breach of the standard of care only if he is a "similarly situated health care provider" as defined above.

STATEMENT OF THE CASE

A. Course of Proceedings and Dispositions in the Court Below

Plaintiff/Appellant R. A. Barton ("Becky Barton") filed her original complaint in this case in the state court in July 1991, against Defendants the Red Cross and its Alabama Director, Dr. Eoline McGowan, alleging that Becky Barton had been infected with HIV virus as the result of a transfusion with blood obtained from a donor who was negligently and wantonly screened and which blood was negligently and wantonly tested. The complaint was amended to add as Plaintiffs Becky's husband, J. R. Barton, Sr., and her sons, J. R. Barton, Jr., and Blake Barton, and to allege claims of loss of consortium on behalf of her husband and children.

In August 1991, the Red Cross and Dr. McGowan removed the case to the United States District Court for the Middle District of Alabama,[1] asserting the defense of sovereign immunity and the statute of limitations. (App. 58a). The Defendants moved for a temporary stay of discovery on the merits and a protective order, which was granted by the Court, except that the parties were granted leave to conduct discovery as to the statute of limitations issue. Thereafter, the Defendants filed a motion for summary judgment which was denied with respect to the pertinent issues here. (App. 60a).

The Bartons' amended the complaint to allege fraudulent suppression for a period of approximately 6 months, by the Defendants of the information that the donor of the blood transfused into Becky Barton was infected

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[1] Pursuant to 36 U.S.C.A. § 2, the federal district courts have orriginal jurisdiction over all cases to which the Red Cross is a party. *See American National Red Cross v. S.G.*, 505 U.S. ——, 112 S. Ct. 2465, 120 L.Ed.2d 201 (1992).

with the HIV virus, and also alleging that the aforesaid suppression constituted actionable outrageous conduct. (App. 6a).

In December 1992, the district court granted a motion to strike the Bartons' claim for punitive damages. (App. 67a).

In December 1992, the Bartons filed a motion to compel answers to interrogatories and responses to requests for production in which they sought court intervention for the first time in their efforts to obtain discovery from the unidentified donor of the blood transfused into Becky Barton. Said motion was denied without prejudice with instructions from the district court that the Bartons attempt to obtain the requested information from other sources. On February 3, 1993, the Bartons renewed their motion to compel discovery from the donor, alleging that they had deposed other witnesses regarding the screening procedures applied by Red Cross as instructed by the court, but had not been able to obtain the necessary information. (App. 49a). Said motion was set for oral argument and heard on March 1, 1993. This issue was taken under advisement by the magistrate judge.

In January 1993, the Defendants had filed another motion for summary judgment, which was taken under advisement along with the supporting and opposing submissions.

In February 1993, the Red Cross filed a motion to strike the Barton's demand for a jury trial, and in March, Dr. McGowan filed a motion to dismiss all claims against her, or in the alternative, to strike the Bartons' claim for punitive damages and demand for jury trial as to her. (App. 34a; 50a).

On June 29, the district court issued an order granting the Red Cross' motion to strike the Bartons' jury demand, which was vacated on July 7 and a revised order issued (App. 50a). On July 9, the district court issued a final judgment and memorandum opinion in which it granted Defendants' motion for summary judgment in full as to both parties. (App. 43a). The court also issued an order denying as moot the Bartons' motion to compel discovery from the blood donor. (App. 48a).

The Bartons filed a motion to alter, amend, or vacate the court's judgment on July 23, based in part upon the court's entry of summary judgment prior to ruling on the Bartons' motion to compel discovery from the blood donor. (App. 72a). The court issued an order on August 17 referring the donor discovery issue back to the magistrate judge and continuing the submission of the Bartons' motion to alter, amend, or vacate to allow them to submit additional discovery and briefs. (App. 72a). Thereafter, the magistrate judge entered an order granting the Bartons' motion and appointing attorneys for the unidentified donor. (App. 72a). The attorneys for the parties developed a list of written interrogatories to be propounded to the donor, and the attorneys appointed to represent her began efforts to locate her. When the initial efforts proved unsuccessful, the Bartons requested and were granted extensions of the discovery deadlines by the court in order to allow time for additional attempts by the attorneys to locate the donor while maintaining the confidential nature of her identity. (App. 73a). On November 22, the magistrate judge issued a recommendation that the Bartons' motion to alter, amend, or vacate the judgment be denied. (App. 72a). On December 15, the district court entered an order adopting the magistrate judge's recommendation, overruling the Bartons' objections thereto, and denying the motion to alter, amend, or vacate the final judgment. (App. 70a).

The Bartons filed a timely notice of appeal to the United States Court of Appeals for the Eleventh Circuit on December 27. That court's jurisdiction was posited under 28 U.S.C. § 1291. The Barton's also sought permissive appeal of the punitive damages and jury trial issues, under 28 U.S.C. § 1292(b), which was granted by the Eleventh Circuit.

B. Statement of the Facts

In June 1988, a 25-year-old woman donated blood to the Red Cross at a donor site in Montgomery, Alabama. (App. 4a). After collecting the donor's blood, the Red Cross tested it for HIV using an initial screening test known as an "ELISA" test. The blood tested negative for HIV and was sent out for use in transfusions. It is possible, however, for a screening test to fail to detect the presence of HIV in blood if the donor is tested within a brief "window period" which occurs between infection with HIV and the time in which antibodies become detectable in the blood upon testing. (App. 4a-5a). In July 1988, Becky Barton was given a blood transfusion with blood provided by the Red Cross from the donor referred to above.

In June 1990, the same donor again gave blood to the Red Cross. The Red Cross again tested the donated blood using the ELISA test, but on this occasion, the blood tested positive for HIV. The Red Cross subsequently conducted a procedure known as "lookback" to determine whether the donor had previously given blood and, if so, to whom the blood had been given. The hospital supplying the transfusion to Becky Barton was not notified of the donor's HIV-positive status until December 13, 1990. *Id.* The hospital then contacted the physician who treated Becky Barton in 1988, and he notified her on January 3, 1991, of the possibility that she had received HIV infected blood in the transfusion. Mrs. Barton took an initial ELISA test, the results of which were

positive for HIV, following which the positive results were confirmed by a Western Blot. (App. 5a). Mrs. Barton is married, has two children living at home, and prior to her notification that she was infected with the HIV virus, taught third grade in Andalusia, Alabama. (App. 58a).

In February or March 1992, the Bartons learned for the first time through discovery of the Red Cross' six-month delay in informing them of the blood donor's HIV-positive status and the Red Cross' position that it has no duty to so inform recipients, but does so only on a voluntary basis, and shortly thereafter, they amended their complaint to add claims for fraudulent suppression and outrageous conduct. (App. 6a).

REASONS FOR GRANTING THE PETITION

I. SCREENING AND TESTING PROCEDURES

Applying Alabama's Medical Liability Act, *Ala. Code*, §§ 6-5-480, 6-5-540-552 ("the AMLA") the district court has held that "the Bartons must show that the actions of [the Defendants] were not in accordance with those of similarly situated blood collectors at the time of the challenged action" (App. 6a), and that such showing can only be made through the testimony of an expert witness who is a "similarly situated health care provider" (App. 11a). The trial court further found that the only exception to this rule was where "an understanding of . . . lack of due care or skill requires only common knowledge or experience." (App. 16a).

The liberal application of the "common knowledge or experience" rule is mandated by a large body of law, both state and federal, that rejects industry practice as an unalterably required standard of care. In *Texas v. Pacific Ry. Co. v. Behymer*, 189 U.S. 468 (1903), Justice Holmes eloquently said: "What usually is done may be evidence of what ought to be done, but what ought to be

done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." Similarly, in *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932), Judge Learned Hand rejected an argument that the absence of radio receivers on tugboats was acceptable industry practice and therefore established a standard of care for all tugboats as follows:

> "Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; *a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.*"

(emphasis added). Alabama courts have uniformly adhered to this same principle. See *Alabama Power Co. v. Robinson*, 404 So.2d 22 (Ala. 1981), (rejecting a jury charge given in the trial court describing electric utility company's duty as using and following practices generally recognized as safe and prudent by other electric utility companies).

It defies reason to assume that the Alabama Legislature intended to reject this time-honored rule of constitutional significance and completely replace it with a standard of care that left a determination of culpability entirely in the hands of the blood bank community.

The "common knowledge or experience" rule applies and expert testimony is not required, where a foreign substance is left in a patient's body, or where the injury complained of is not connected to the condition for which the plaintiff sought treatment. *Allred v. Shirley*, 598 So.2d 1347, 1350 (Ala. 1992). In this case, negligence was established because a foreign substance, the HIV virus, was permitted, "through the absence of requisite care, diligence or skill, to remain in the body" of the plaintiff. *Sellers v. Noah*, 209 Ala. 103, 105, 95 So. 167

(1923). See Also, *Riase v. Wood*, 540 So.2d 646 (Ala. 1988). The "common knowledge and experience" rule should also apply here because the injury sustained was in no way connected to the reason the patient originally sought treatment-for gastrointestinal bleeding. The trial court's decision in this regard is erroneous because duties become greater as the likelihood of serious damage increases (*Industrial Chem. & Fiberglass Corp. v. Chandler*, 547 So.2d 812 [Ala. 1988]), and in view of the fact that the infusion of HIV-contaminated blood results in certain death, and in view of Red Cross' own position that the risk is so great that it will not even accept a transfusion *recipient's* blood for six months after he or she received a transfusion.

If the AMLA standards also govern the claims regarding Red Cross' refusal to notify Ms. Barton of her peril, the "common knowledge or experience" rule would also apply to that facet of the case. The emotional pain and suffering that she felt as a result of Red Cross' callous indifferences to her ignorance of her condition bore no relationship whatsoever to the reason she initially sought treatment.

A. Expert Testimony Requirements

Under the AMLA, expert testimony of a "similarly situated health care provider" is generally necessary to establish a violation of the applicable standard of care owed by a defendant professional entity to a plaintiff unless the violation is so obvious that a reasonable person can see it. *Watson, Watson & Rutland v. Board of Education*, 559 So.2d 168, 173 (Ala. 1990). The exception has been made in Alabama for cases in which an understanding of the professional's lack of due care or skill requires only common knowledge or experience applies to this provision, also. *Plitt v. Griggs*, 585 So. 2d 1317, 1325 (Ala. 1991). The district court concluded without explanation that whether the Red Cross' blood testing and donor

screen procedures met the standard of care is not an issue that is an exception to the general rule. The Bartons contend that the district court was in error in so concluding and that the violations of the standard of care herein are of the type which are so obvious that a reasonable person can ascertain them.

Common knowledge in this case confirms that the devastating results of error command that duties regarding blood collection be placed at the highest level. *Chandler*, 547 So.2d at 812. The Defendants' chief witness, testified that the ELISA test produced from 6 to 10 "false positive" results for every true positive result and that, because of the sensitivity of the test, retesting would not improve performance. The evidence showed, however, that blood from 26 donors that had previously tested positive went through a re-test on June 26, 1988, and that 25 of the 26 re-tested as negative. If there is a given ratio of 6:1 to 10:1 false positive to true positive, then logic would dictate that at least one or two more of the "false positive" in that batch were likely "true positive," or that something was seriously amiss with the testing procedure.

As to the screening procedures, the screening questions do not place a person who is heterosexually promiscuous among those persons who are "at risk," even though, as the trial court noted, the Red Cross' official in charge of blood services in 1991 testified that a female donor who "went home with a different man every right" should have been cautioned by Red Cross that she may be at risk of contracting HIV. (App. 18a-19a). The same official also testified that a female was several times more likely to contract the HIV virus from a male heterosexual partner than a male would be to contract it from a female. Figures released by the Center for Disease Control indicate that AIDS cases resulting from heterosexual contact increased 17.1 percent in 1992, as opposed to a 1 percent increase from tainted needles.

The trial court noted in its memorandum opinion that Dr. Paul V. Holland, a witness for Red Cross, testified that:

> "[H]eterosexual promiscuity has never been a high risk category for AIDS as defined by the Public Health Services and that, even today, blood collectors do not ask questions about heterosexual promiscuity."

(App. 19a). According to all the other evidence available in this case, common knowledge is all that is needed for one to conclude that retesting and screening for heterosexual promiscuity are *necessary* steps in the process of collecting blood.

Assuming, arguendo, that expert testimony is required in this case, then the Bartons contend that the district court was in error in holding that their expert, Irving R. Schwartz, M.D., was not qualified to testify as an expert in this case against the Red Cross. Expert medical testimony under the AMLA must be furnished by a "similarly situated health care provider." Under the criteria established in § 6-5-548(b) of the AMLA, the similarly situated health care provider who may provide expert testimony against an entity such as the Red Cross is one who is licensed by an appropriate regulatory board or agency, is experienced in the same discipline or school of practice, and has practiced in the same discipline or school of practice during the year preceding the date that the alleged breach of the standard of care occurred. An exact match of specialties is not possible here, and is not required, although the expert witness should have approximately the same level of specialization. *Medlin v. Crosby*, 583 So.2d 1290, 1295 (Ala. 1991).

Dr. Schwartz meets the requirements of § 6-5-548(b), and is competent to offer expert testimony against the Red Cross. Dr. Schwartz is the Director of the Outpatient Blood Services Department at Albert Einstein Medical Center in Philadelphia, Pennsylvania and has worked extensively in the field of hematology. As the Di-

rector of Outpatient Blood Services, Dr. Schwartz is involved with the distribution of blood products for transfusion into patients at his hospital and he is acutely aware of the need to make sure the blood he distributes has met all appropriate standards to insure the safety and well-being of the patients who will receive it, and is, therefore, well aware of said standards. In addition, Dr. Schwartz is a member of blood banking organizations, and is on the Medical Advisory Committee for the Delaware Valley Regional Blood Center of the American Red Cross, from which his hospital receives the blood it utilizes. Dr. Schwartz practiced in the field of blood banking during the year immediately preceding Becky Barton's transfusion. He is also familiar with the lookback procedures conducted by the Red Cross.

The district court found that, although Dr. Schwartz had some experience and training in certain aspects of blood banking, he did not qualify as a similarly situated health care provider because he did not have experience and training in the specific type of blood collection, processing, and distribution involved in this litigation. (App. 16a). The Supreme Court of Alabama has held, in a case interpreting an earlier version of the AMLA, that even if the defendant and the expert are in different schools of practice, the witness may be still be competent to testify about those standards regarding which the principles of the schools do or should concur. *Wozny v. Godsil*, 474 So.2d 1078, 1087 (Ala. 1985). That same standard should be applied here.

II. STANDARD OF CARE FOR DONOR SCREENING AND BLOOD TESTING

As Becky Barton's illness clearly evidences, the presence of the HIV virus in the blood of the donor which she received in transfusion went undetected at the time of the donation and subsequent transfusion to Mrs. Barton. There are two possibilities which explain why this tragedy occurred. One is that Mrs. Barton was so unfortunate

as to receive blood which was donated by a female donor who did not realize that she was at risk for AIDS during the "window period" in which the donor was already infected with HIV but before antibodies were present in the blood which could be detected by ELISA testing. This is a remote possibility and a rare occurrence. The other is that something went wrong with the screening procedure, the testing procedure, or the way in which the testing and screening were administered. The Bartons contend that the Defendants violated the requisite standard of care in two ways. First, they contend that the Defendants failed to adequately screen the donor of the infected blood before her blood was collected. Second, they contend that the Defendants failed to adequately test the donated blood for infection before releasing it for transfusion.

During the interview screening process, specific questions should be asked of a prospective donor and the donor should be required to read a pamphlet entitled "What You Must Know Before Giving Blood." The purpose of the screening questions and pamphlet is to advise a donor whether he or she is at risk for AIDS and certain other conditions and that a donor should not give blood if he or she is at risk. "At risk" individuals are described as persons who have engaged in the following conduct since 1977: men who have had sex with another man, persons using illegal drugs by needle, natives of Haiti and certain African countries, hemophiliacs who have taken clotting factor concentrates, persons who have had a positive test for AIDS, persons who have AIDS or its symptoms,[2] persons who have had sex with anyone de-

[2] The symptoms of AIDS are described by the pamphlet as unexplained weight loss of 10 pounds or more in less than 2 months, night sweats, blue or purple spots under the skin, long lasting white spots or unusual sores in the mouth, lumps in the neck, armpits, or groin lasting longer than a month, fever higher than 99 degrees lasting longer than 10 days, and diarrhea that lasts longer than a month.

scribed in the pamphlet, prostitutes (male or female), men who have had sex with a female prostitute, and women who have had sex with a male prostitute. In *Kirkendall v. Harbor Ins. Co.*, 698 F. Supp. 768 (W.D. Ark. 1988), the court noted that, as early as May 18, 1983, it was suggested that screening questions of donors should include advice that sexual partners of those at risk were also at risk. By 1988, however, the screening process utilized by the Defendants did not, nor does it now, include advice that a donor who has been sexually promiscuous is at risk, as is the sexual partner of someone who is or has been sexually promiscuous.

Witnesses for both sides, including Red Cross officials, acknowledged that the addition of such criteria to the list of screening questions would be desirable and that it was conceivable that such a question could have affected the outcome of this particular case. Red Cross officials admitted that the screening process should advise that a sexually promiscuous woman donor was at risk and that the sexual histories of donors would not be inappropriate to ask during screening.

The American Association of Blood Banks publishes "Standards for Blood Banks and Transfusion Services," the document which the Defendants maintain sets forth the appropriate standard of care in this case ("the AABB Standards"). Section B1.263 of the AABB Standards requires that "[a]ll donors must be given educational materials informing them of the high risk groups or activities for AIDS and that persons at risk for AIDS should refrain from donating blood." While some such information is included in the educational material, prospective donors were never informed that sexual promiscuity, or heterosexual contacts with another person who was sexually promiscuous, placed the donor at a high risk of infection. Such failure clearly constituted a breach of the Defendants' duty in this case.

The Bartons also presented sufficient evidence to the district court regarding failures of the Alabama Region of the Red Cross to adhere to its own documented screening procedures to establish a question of material fact. On May 25, 1988, about a month before the donor gave the infected blood in this case, representatives of the Food and Drug Administration ("FDA") criticized the Alabama Region after noting that seven of eight donors observed at an Alabama collection site were not given the requisite pamphlet, and that the donors observed were not asked if they read and understood the pamphlet or the consent statement on the donor form. The FDA also reported that on November 19, 1987, a donor answered affirmatively to a screening question involving hepatitis, but no further investigation was conducted. In November of 1988, the FDA noted that two 1988 donors who had previously self-excluded did not self-exclude in 1988 and that the blood was processed and shipped, apparently ignoring deferral procedures.

Turning to the failure to adequately test donated blood for infection before releasing it for transfusion, the Bartons submit that they offered sufficient evidence in opposition to summary judgment to establish a material question of fact. Dr. Schwartz's deposition was replete with questions about the reliability of the testing processes around the time of the donor's June 1988 donation. The day the donor's blood was tested on June 23, 1988, the tube containing her blood was only three rack spaces from Unit No. 41LG32575, which tested positive for the HIV virus at that time, and Dr. Schwartz expressed concern about the possible juxtaposition of those tubes. Dr. Schwartz also expressed concern that there were seven previously positive samples that were retested in the same batch as the blood of Becky Barton's donor, and that the high number of retests on that day caused him to wonder what was happening and to question the reliability of the testing as it was done at that time due

to the inconsistent results. According to Dr. Holland, Unit No. 41LG32575 was confirmed positive for HIV by a Western Blot test performed at the Red Cross' national headquarters on July 25. When Unit No. 41LG-32575 was retested in duplicate on June 26, the samples from a total of 26 donors were tested in duplicate at the same time. Although all had previously tested positive on the ELISA test, of the 26 donors, 25 retested negative on June 26. Since Dr. Schwartz had been concerned about the incorrect results on the previous tests of seven units, it is more than obvious that he would have been overwhelmed to learn that three days later it had been necessary to retest more than three times that many, and that 25 of the 26 retests had revealed results different from the results obtained on the first tests.

According to one Red Cross employee, the practice in the Alabama region of the Red Cross, consistent with the test kit manufacturer's instructions, was to run one preliminary ELISA test as soon as possible after collecting the blood.

If that test was negative, the blood was used in the blood service system. If that first test was positive, however, two other duplicative tests were run. If both of the duplicative tests were negative, the blood was used. If either of the two duplicate test results were positive, the blood was destroyed and a sample sent to another laboratory to have the confirmatory Western Blot test run. Even though there were a total of 32 blood donors whose blood was tested inconsistently with the ELISA test from June 23 to June 26, 1988, no substantial reason was given for not running more than one ELISA test initially. The Red Cross simply followed the manufacturers' instructions.

The testimony of the Defendants' witnesses is widely varying absent the question of the reliability of the first ELISA test. Some say that an initial positive ELISA

test can be easily unreliable, while others imply that an initial positive is virtually conclusive as to the use of the blood. If negative results can follow positive results, there is certainly no reason that can be given why a follow-up of a negative test might not produce a positive result. The test cost is minimal, and it is difficult to imagine why more initial ELISA testing is not employed after an initial negative ELISA result.

Adding significantly to the evidence of negligence and recklessness in this case is the fact that the operation of the regional blood service out of the Birmingham office was in a state of virtual chaos during the time relevant to all of the issues in this case. One Red Cross official in the blood services unit in Birmingham testified that she repeatedly complained to her supervisor that she did not have sufficient staff to adequately perform her functions. Dr. McGowan was terminated from her position as medical director of the Red Cross Alabama Regional Blood Bank in November 1990 after serving for 22 years in that position. The letter of termination advised her that it was necessary that the Red Cross implement more aggressive efforts and achieve more substantial results in dealing with the issues raised in the recent FDA inspections. A Red Cross official testified that he fired Dr. McGowan because she created a dangerous situation by resuming a higher level of blood testing activity in the regional laboratory than the national headquarters had allowed her to do, and that she did so without notification to the national headquarters or FDA.

Inspection reports from the FDA concerning the Alabama Regional Blood Bank were submitted to the district court in opposition to the Defendants' motions for summary judgment. These and earlier FDA inspection reports regarding the Alabama region indicate that instances of noncompliance with FDA regulations were occurring regularly at the Alabama regional headquarters, so much so that a meeting by FDA officials with Alabama

Red Cross officials regarding a plan for bringing the area back into compliance was necessary.

Section B5.510 of the AABB Standards provides that a sample of blood "from each donation shall be tested for . . . anti HIV. Whole blood and blood components shall not be used for transfusion unless the tests are non-reactive." The Red Cross has admitted that it does not comply with this standard. The Red Cross is using blood that tests positive on a first test every time that it can get two follow-up negative results. Thus, Red Cross is not following the standard prohibiting the use of blood for transfusion unless the tests (specified in the plural) are nonreactive.

III. DONOR DISCOVERY

The Circuit Courts of Appeal have been sharply divided upon the question of discovery from a blood donor in cases such as this. See, e.g., *Watson v. Lowcountry Red Cross*, 974 F.2d 482 (4th Cir. 1992); *Coleman v. American Red Cross*, 979 F.2d 1135 (6th Cir. 1992). The lower federal courts are strongly divided upon the issue of donor discovery as they struggle to balance the interests of plaintiffs, donors, the blood-banking industry, and the public. *See Estate of Hoyle v. American Red Cross*, 149 F.R.D. 215 (D. Utah. 1993); *Long v. American Red Cross*, 145 F.R.D. 658 (S.D. Ohio 1993); *Sampson v American National Red Cross*, 139 F.R.D. 95 (N.D. Tex. 1991).

In December 1992, the Bartons filed a motion to allow them to obtain limited and confidential discovery from the donor of the blood that was transfused into Becky Barton. Upon instruction from the court, they attempted to obtain this information from other sources, but could not, whereupon they again requested the court to allow donor discovery. That motion remained pending from March 1, 1993, until the time that summary judgment was entered on July 9, 1993 with no response from the

court except to deny it as moot when summary judgment was entered. (App. 48a-49a). Donor discovery was crucial in this case because the donor is the only person who is capable of providing evidence that could have affected both the question of whether the donation could have been made during the window period and whether appropriate screening procedures were used prior to her donation. The Bartons' inability to at least question the donor severely hampered their case and deprived the court of evidence that could have been of assistance to it in deciding certain of the issues, especially that of the care utilized in the screening process. Nevertheless, the Bartons were not accorded a ruling on their motion until after they filed a motion to alter, amend, or vacate summary judgment in this case.

By the time discovery was finally allowed in September 1993, efforts to locate the donor produced no results. The donors' attorneys did ultimately locate a relative of the donor who indicated she had infrequent contact with the donor. Shortly after this relative was located, the court issued orders concluding discovery in this case and entering final judgment denying the Bartons' motion to alter, amend, or vacate, even though holidays were approaching, providing a time when relatives are likely to communicate.

Surely, after the inordinate delay in responding to the Bartons' request for discovery rulings, which increased the difficulty of finding the donor, the court could have allowed additional time in which these efforts might have been intensified. The magistrate judge found that the law does not grant litigants unlimited time for discovery, and concluded that it was pure speculation to assert that more time would yield evidence compelling a different result. The Bartons assert that the law does not deny a reasonable time for discovery, and that a closure of efforts within a short time after a significant lead was found was not reasonable.

IV. CONDUCT OF LOOKBACK PROCEDURES

The Bartons maintain that the chaotic conditions and instances of noncompliance in the Alabama Region noted by the FDA indicate the presence of a material issue of fact regarding whether these conditions proximately contributed to the delay by the Defendants in notifying the Bartons of Becky Barton's exposure to the HIV virus during the lookback procedure.

V. FRAUDULENT SUPPRESSION AND OUTRAGEOUS CONDUCT

The Bartons contend that the Red Cross fraudulently suppressed from them the fact that Becky Barton had been exposed to HIV-infected blood for a six-month period, and that its conduct in disclaiming any duty to inform her amounted to outrageous conduct.[3] Mrs. Barton's donor gave blood a second time to the Red Cross in 1990, when she tested positive. Six months later Red Cross notified the transfusing hospital that one of its transfusion recipients had received blood from an infected donor in 1988. In its order granting summary judgment, the district court found that the Bartons had met each element required to establish their claim for fraudulent suppression under Alabama law. (App. 31a). The court found that the Red Cross did have a duty to disclose the facts to the Bartons, that it had failed to disclose this essential information, and that the Bartons had raised a genuine issue of material fact as to their reliance to their detriment on the Red Cross' notification delay and their injuries as a result thereof. (App. 31a-33a). In reaching this conclusion, the trial court said: "*The Red Cross asserts that it had no duty to warn Mrs.*

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[3] The Supreme Court of Alabama recognized the intentional or reckless tort of outrageous conduct causing severe emotional distress in *American Road Serv. Co. v. Inman*, 394 So.2d 361, 365 (Ala. 1980), in which it held that willful wrongs, or those so reckless as to be willful, authorized recovery in damages for the mental suffering caused thereby. *See also, Green Tree Acceptance v. Standridge*, 565 So.2d 38, 44 (Ala. 1990).

Barton of potential danger because no confidential relationship existed between the Red Cross and Mrs. Barton." (App. 28a-29a) (Emphasis added). In rejecting that position, the court stated:

> The particular undisclosed fact here, the donor's HIV-positive status, was a tremendous value to Mrs. Barton. Not only did the knowledge affect Mrs. Barton's own health but it also affected her behavior toward her family, especially her husband, and her students. Without the knowledge that she was possibly HIV-positive, she unwittingly put her family and students at risk of becoming infected as well. Thus, the particular fact here did not merely concern the monteary value of merchandise but the lives of numerous individuals.
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> . . .
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> The relative knowledge of the parties also points heavily toward finding a duty of disclose. Mrs. Barton had no way of knowing that the donor had tested positive. The only other point at which Mrs. Barton would have discovered the need for an HIV test would have been once she showed the symptoms of having HIV, a point which could be too late to extend her life or to prevent transmission to others. Thus, all of the facts were within the Red Cross's knowledge.

(App. 29a-30a).

It is clear that, if there is a viable action in existence to redress outrageous conduct, the unbelievably callous attitude of Red Cross in taking the position it has taken fully justifies its application here. Nevertheless, the court granted summary judgment in favor of the Defendants because it found that the Bartons had not presented any evidence regarding what period of time would have been reasonable or violative of the standard of care in the industry pertaining to lookback procedures. The Bartons maintain that they did present evidence from not only their expert witness, but also expert witnesses from the Red Cross, that a six-month delay in notifying the re-

cipient of HIV-contaminated blood that she could be at risk for AIDS is far too long and violative of any appropriate standard of care.

The witnesses essentially agreed that the delay in this case was inordinate and that time standards should have been imposed by Red Cross in virtue of the devastating effects that delay could cause. The district court cited an FDA investigation report which indicates that a four-month notification delay for donors may be too long. (App. 28a). Surely, if such a delay in notifying an affected donor is unreasonable, an equal or greater delay in notifying an affected recipient is also unreasonable. Furthermore, given the Defendants' position that they had no obligation whatsoever to make the Plaintiffs aware of the knowledge about the HIV-infected donor which they possessed, it is apparent that the Defendants acknowledged no urgency whatsoever in notification, and could ostensibly taken even longer than they did in this case to share such information with a potentially affected blood transfusion recipient. Despite the official position of the American Red Cross that lookback is not a duty, Red Cross officials knew that the procedures are morally obligatory.

The Plaintiffs do not agree that their claim for fraudulent suppression of material information should be characterized as medical malpractice. Assuming *arguendo* that it should be, however, the Plaintiffs point out that the very withholding of material facts is a breach of the duty undertaken by a medical provider to safeguard the interests of those receiving the provided care, and constitutes actionable fraud. *Johnson v. McMurray*, 461 So. 2d 775, 778 (Ala. 1984). (Policy considerations dictating a confidential nature in a doctor-patient relationship are grounded upon the necessity for each to fully disclose certain essential information to the other). Surely if the Defendants are medical providers covered by the Alabama Medical Liability Act, they must also assume obligations imposed upon such providers.

The witnesses agreed that the purpose of the lookback procedure is to identify recipients of blood donated by persons later found to be HIV-positive so that such recipients, if alive, can be counselled about measures to prevent the spread of infection and can seek appropriate medical care. The extended failure and refusal to impart such knowledge to any blood transfusion recipient by any supplier of blood products must certainly be a clearly apparent violation of any reasonable standard of care, and cannot be condoned.

Fraudulent concealment may be the basis for a medical malpractice cause of action. *Trammer v. Bernstein*, 596 So. 2d 572, 574 (Ala. 1991); *Johnson*, 461 So.2d at 775. The district court found that the Bartons' claim of fraudulent suppression was in substance a challenge to medical procedures in the form of a claim for negligence in conducting the lookback and notification process. The Bartons disagree. Had the Red Cross suppressed information regarding its screening and testing procedures, for example, which affected the blood supplied for transfusion into Becky Barton, such suppression might indeed be properly labeled medical malpractice, since those procedures led to Mrs. Barton's infection. In the case of the lookback procedures, however, medical procedures are not at issue. The lookback process is an administrative one that tracks donors found to have infected blood products to see whether there is any potential that they have exposed others to infection in the past, and if so, that notifies the affected recipients.

The Bartons contend that they submitted substantial evidence to manifest to the district court that a material issue of fact existed regarding each of the elements of the tort of outrage. Regardless of the intentions of the Defendants, any delay over and above that absolutely necessary to obtain confirmation of the positive HIV status of the 1988 donor on her subsequent donation in 1990 was sufficiently reckless as to be outrageous, especially

when it is coupled with the Defendants' claim that *they had no duty whatsoever to advise Becky Barton of her exposure.*

The district court noted that the Red Cross has no time limits in its policy guidelines for conducting lookbacks and notifications, and that the lack of guidelines suggests that a six-month delay was not outrageous. The Bartons must disagree, and respectfully suggest that the lack of guidelines mandating time limits for this critical procedure supports their argument that the conduct of the Defendants was itself outrageous. Surely no more is required for a finding that the Defendants have committed the tort of outrageous conduct.

VI. SOVEREIGN AND OFFICIAL IMMUNITY

The trial court held that the status of Red Cross as a federal instrumentality entitled it to sovereign immunity from suit except to the extent that such immunity had been waived by the "sue and be sued" provision in its creating legislation, 36 U.S.C. § 2. After examining precedent in the field, the district court found that Red Cross was exempt from jury trials and from liability for punitive damages, and that its Alabama blood bank supervisor, Dr. Eoline McGowan was entitled to official immunity. (App. 35a; 50a; 58a).

Although the court had held that "sue and be sued" waivers should be liberally construed (*Federal Housing Admin. v. Burr*, 309 U.S. 242 (1940)), lower courts are in a state of discord as to whether organizations like the Red Cross can be subjected to jury trials and to punitive damages, particularly in view of this Court's holding in *American National Red Cross v. S.G., supra.* A government instrumentality does not acquire the government's immunity simply because it performs governmental functions. *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939) *See also, Algernon Blair Indus. v. Tennessee Valley Authority*, 552 F. Supp. 972 (M.D. Ala. 1982).

Red Cross has made no dispositive showing to defeat the presumption that Congress intended to fully waive sovereign immunity, and the courts below erred in limiting the "sue and be sued" provision included in the Red Cross charter. Similarly, the official immunity protection of Dr. McGowan is entertained with that issue.

CONCLUSION

For the foregoing reasons, the petitioner requests that this Honorable Court grant this petition for writ of certiorari.

Respectfully submitted,

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